Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1847

PAUL A. MASON, *Petitioner,*

v.

JANET BELL McDOWELL, *Respondent.*

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-224 D

PAUL A. MASON,

Petitioner

vs.

JANET BELL McDOWELL,

Respondent

MEMORANDUM

BARRON P. McCUNE, District Judge

April 25, 1979.

This complaint is for a Writ of Habeas Corpus in a custody case. The petitioner, Paul A. Mason, a resident of West Virginia, divorced his wife, Janet Louise Mason, in Etowah County, Alabama, on September 24, 1975. By the divorce decree, Lisa, their child of four years of age, was placed in her father's custody. The child's mother was awarded the privilege of reasonable visitation. While petitioner was a resident of West Virginia and his former wife was a resident of Pennsylvania, the child was visiting her mother, and about March 15, 1976, was not returned to her father. Instead, a complaint for custody was filed by the mother in the Court of Common Pleas of Allegheny County. By order of March 15, 1976, the court fixed a hearing for March 25, 1976, and, pending the hearing, enjoined petitioner from removing child from jurisdiction.

Plaintiff alleges that the portion of the order enjoining removal of the child pending the hearing is an *ex parte* order. Because the order is *ex parte*, the petitioner argues that the order constitutes a denial of due process and equal protection in violation of the Fourteenth Amendment. Petitioner seeks return of the child to his custody.

Petitioner's complaint suffers from numerous infirmities. First, the case is either moot or petitioner has not exhausted his state remedies. The order complained of extends from March 15 to March 25, 1976, the date scheduled for a hearing. On its face, the order has expired. If petitioner does not have custody of his child in 1979, it is not by force of this order, which expired over three years ago. The order could be interpreted to extend to the date of a "proper hearing" if one was not had on March 25, 1976. If such is the case, however, petitioner should seek this hearing in state court. He has not exhausted his state remedies. Under either interpretation of the order, it gives no basis for habeas corpus relief.

Even if petitioner's claims survive the expiration of the March 25, 1976 order and he has exhausted his state remedies, they are not properly raised through the vehicle of a habeas corpus petition. The Court of Appeals for the First Circuit has rejected use of the Writ of Habeas Corpus to attack custody orders of state courts. *Donnelly* v. *Donnelly*, 515 F.2d 129 (1st Cir. 1975). Absent any authority in this circuit, we follow this precedent.

An appropriate order follows.

/s/ Barron P. McCune
Barron P. McCune
United States District Judge

Dated: April 25, 1979.
cc: Counsel of record.

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ORDER

AND Now, April 25, 1979, respondent's Motion to Dismiss is granted.

/s/ BARRON P. McCUNE
Barron P. McCune
UNITED STATES DISTRICT JUDGE

cc: Raymond Radakovich, Esq.
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